STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

Appeal From The Michigan Court Of Appeals

TERRI ROHDE, BRENDON QUILTER, MARY QUILTER, WALTER MACKEY, BARBARA MACKEY, GARY GIBSON, ELLEN GIBSON, TED JUNGKUNTZ, LOISE JUNGKUNTZ, DAVID SPONSELLER, MARY SPONSELLER, MIKE GLADIEUX, MARTHA GLADIEUX, HELEN RYSSE, TERRY TROMBLEY, JOHN WILLIAMS and THERESE WILLIAMS,

Plaintiffs-Appellants,

v.

ANN ARBOR PUBLIC SCHOOLS a/k/a The Public Schools of the City of Ann Arbor, BOARD OF EDUCATION FOR ANN ARBOR PUBLIC SCHOOLS, KAREN CROSS, in her official capacity as President of the Board of Education for Ann Arbor Public Schools, and GLENN NELSON, in his official capacity as Treasurer of the Board of Education for Ann Arbor Public Schools,

Defendants-Appellees,

and

ANN ARBOR EDUCATION ASSOCIATION, MEA/NEA,

Intervening Defendants-Appellees.

Supreme Court Case No. 128768

Court of Appeals Case No. 253565

Washtenaw County Circuit Court Case No. 03-1046-CZ

DEFENDANTS-APPELLEES' SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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QUESTIONS PRESENTED

I. DO PLAINTIFFS-APPELLANTS MEET THE GROUNDS FOR LEAVE TO APPEAL SET FORTH IN 7.302(B)(1), (2), OR (3)?

Plaintiffs-Appellants would answer.....Yes

Defendants-Appellees answer.....No

The Circuit Court would answer.....No

The Court of Appeals would answer .....No

This Court should answer.....No

II. DID PLAINTIFFS FULFILL THE REQUIREMENT OF MCL 129.61 THAT BEFORE A SUIT IS BROUGHT FOR THE BENEFIT OF THE TREASURER OF A POLITICAL SUBDIVISION FOR AN ACCOUNTING OR THE RECOVERY OF FUNDS UNLAWFULLY EXPENDED, A DEMAND "SHALL BE MADE ON THE . . . OFFICER WHOSE DUTY IT MAY BE TO MAINTAIN SUCH SUIT FOLLOWED BY A NEGLECT OR REFUSAL TO TAKE ACTION", BY LETTERS SENT TO VARIOUS INDIVIDUALS, BUT NOT THE SCHOOL DISTRICT TREASURER, "REQUESTING" THAT THEY "INVESTIGATE" AND "HALT THE USE OF PUBLIC FUNDS" TO PROVIDE DOMESTIC PARTNERSHIP BENEFITS, AND WHICH NOWHERE MENTION 1)AN ACTION UNDER MCL 129.61 OR 2) AN ACCOUNTING OR THE RECOVERY OF FUNDS?

Plaintiffs-Appellants would answer.....Yes

Defendants-Appellees answer .....No

The Circuit Court would answer.....No

The Court of Appeals would answer.....No

This Court should answer.....No

INTRODUCTION

The Court issued an order indicating that it will hear oral argument on whether it should grant Plaintiffs' application for leave to appeal and/or take peremptory action, but directing the parties to address at oral argument only the issue of what constitutes an effective demand under MCL 129.61, and inviting the Parties to submit supplemental briefs on that same limited issue. (April 28, 2006 Order.) This brief is filed by Defendants-Appellees the Ann Arbor Public Schools, the AAPS Board of Education, and the former Board President and Treasurer, Karen Cross and Glenn Nelson respectively (collectively, "AAPS"), pursuant to that Order. As set forth herein, the Court of Appeals correctly found that the letters sent by Plaintiffs years before bringing this suit, requesting that AAPS investigate and halt of the use of funds for domestic partnership benefits to AAPS employees, but which did not request that a suit be brought or request an accounting or recovery of the funds expended, and which letters were never sent to the AAPS Treasurer, did not meet the pre-suit demand requirements of MCL 129.61. This Court should either deny the application for leave to appeal or, if it grants the application for leave to appeal, peremptorily affirm the Court of Appeals' ruling.

SUPPLEMENTAL STATEMENT OF FACTS AND PROCEEDINGS

MCL 129.61 states:

> Any person or persons, or firm or corporation, resident in any township or school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision. Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto. Security for costs shall be filed by the plaintiff or plaintiffs in any such suit or action and all costs and expenses of the same shall be paid by the person or persons instituting the same unless and until

> a recovery of such funds or moneys be obtained as the result of such proceedings.

(Emphasis added.)

The Circuit Court originally found that Plaintiffs lacked standing under MCL 129.61 because they did not file their suit "on behalf of or for the benefit of" the AAPS Treasurer and because they had not satisfied the statute's demand requirement. The Court of Appeals disagreed with the first prong of the Circuit Court's ruling, but agreed with the Circuit Court's finding that Plaintiffs had not complied with the demand requirement and therefore lacked standing. Specifically, the Court of Appeals held:

> Pursuant to MCL 129.61, the party must contact the appropriate party ("the public officer, board, or commission whose duty it may be to maintain such suit") and make a demand that a lawsuit be brought by that party for an accounting or recovery of misappropriated funds. Consulting a dictionary to ascribe the term "demand" its plain and ordinary meaning,...we find that it provides the definition "to ask for with proper authority; claim as a right"....Moreover, the phrase "maintain such suit" indicates that the purpose of the demand requirement is to inform the appropriate party that legal action is forthcoming. Plaintiffs' letters are merely a request that the alleged misappropriation stop; they are not a demand for legal action. Moreover, plaintiffs did not send a letter to the AAPS treasurer, the officer likely responsible for maintaining such a lawsuit.

Rohde v Ann Arbor Public Schools, 265 Mich App 702, 710; 698 NW2d 402 (2005) (cites omitted.)[1]

The Court of Appeals carefully reviewed the letters Plaintiffs sent to various individuals, which letters Plaintiffs claim satisfy the demand requirement. Exemplar copies of the letters,

[1] In addition, Plaintiffs have never filed the necessary security for costs, although this was not one of the Circuit Court's bases for granting summary disposition, nor was it addressed by the Court of Appeals. However, this could be the basis for an affirmance of the grant of summary disposition by this Court, or at the very least, should the Court of Appeals' decision be reversed and the claim be allowed to stand, Plaintiffs should be required to post the requisite security immediately.

which were attached to Plaintiffs' Motion for Reconsideration filed in the Circuit Court (but which were not attached to Plaintiffs' Application for Leave to Appeal to this Court) are attached hereto as Exhibit A. A review of the letters shows that ten plaintiffs (or groups of plaintiffs in the case of married couples), each sent letters to sixteen individuals in December 2000, January 2001, and February 1, 2001, for a total of 160 letters sent in a three month period. The addressees were the nine then-members of the AAPS Board of Education, the then-AAPS Superintendent of Schools, a Washtenaw County Prosecutor, the then-Superintendent and Assistant Superintendent of the State Department of Education, an attorney with the State (whose exact position is unclear), then-Attorney General Jennifer Granholm and then-Governor John Engler. Not one of the Plaintiffs sent a letter to the then-AAPS Treasurer, Ormeela Lapp. The letters are all identically worded, and state:

> I [or "we"] write to request that you investigate and halt the use of public funds to provide so-called "domestic partnership" benefits to employees of the Ann Arbor public schools. I [or "we"] believe that the School District's extension of these benefits to its employees exceeds its authority and violates the state law governing marriage. I [or "We"] ask that you halt this illegal use of public funds at your earliest possible convenience.

The Complaint was not filed until September 22, 2003, almost three years after the letters were sent. The Complaint sought (1) a declaration that the provision of same-sex domestic partner benefits to AAPS employees is unlawful, (2) an order requiring AAPS to account for funds expended to provide such benefits, and (3) an injunction prohibiting the AAPS from entering into any contract or taking any other action that would result in the provision of same-sex domestic partner benefits. By then, only two of the AAPS Board members to whom the letters had been sent remained on the AAPS Board. The other seven members had been elected to the Board long after the letters were sent and therefore did not receive such letters. Also, by that time, AAPS had a new Treasurer, Glenn Nelson, who likewise never received such a letter.

The Circuit Court held that "a 'request' to Defendants to 'halt this illegal use of tax revenues in 2001' does not meet the specific statutory requirement" of MCL 129.61. (December 29, 2003 Opinion of the Circuit Court.) The Court of Appeals agreed, and a review of the plain language of the statute and the purpose behind pre-suit demand requirements clearly shows the correctness of the lower courts' rulings.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT PLAINTIFFS LACKED STANDING TO BRING THEIR CLAIM BECAUSE PLAINTIFFS DID NOT FULFILL THE DEMAND REQUIREMENT OF MCL 129.61.

As set forth in Defendants' Opposition to Plaintiffs' Application for Leave to Appeal, Plaintiffs do not meet the requirements of MCR 7.302(B) for review by this Court. But should this Court, notwithstanding the arguments set forth in Defendants' Opposition, grant leave to appeal and review the question of standing, the Court should find that the Court of Appeals did not err when it concluded that Plaintiffs lacked the legal capacity to bring their claim because of their failure to fulfill the demand requirements of MCL 129.61.[2]

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[2] Although this Court did not ask the parties to brief the threshold issue of whether MCL 129.61 can create standing in parties who would not otherwise have same, Defendants wish to point out that this Court made clear in *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004) that the judicial test for standing is as follows:

> At a minimum, standing consists of three elements: "First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical' . Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly...traceable to the challenged action of the defendant, and not...the result [of] the independent action of some third party not before the court.' Third, it must be 'likely', as opposed to merely 'speculative', that the injury will be 'redressed by a favorable decision.'"

471 Mich at 628-29, *quoting Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001), (which itself was quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-61

The primary goal of statutory interpretation is to give effect to the intent of the Legislature, and, to discern the legislative intent, the Court must first look to the language of the statute itself; the words used in a statute are given their ordinary meaning; and a statute that is clear and unambiguous on its face must be enforced as written. *See, e.g., Rakestraw v General Dynamics Land System, Inc*, 469 Mich 220, 224; 666 NW2d 159 (2003) ("a bedrock principle of statutory construction is that 'a clear and unambiguous statute leaves no room for judicial construction or interpretation.'... When the statutory language is unambiguous, the proper role of the judiciary is to simply apply the terms of the statute to the facts of a particular case.... In addition, words used by the Legislature must be given their common, ordinary meaning")(cites omitted); *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003) ("when interpreting statutes, our obligation is to discern and give effect to the Legislature's intent as expressed in the statutory language....If the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed---no further judicial construction is required or permitted, and the statute must be enforced as written") (cites omitted); *Nastal v Henderson & Assocs Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005) ("the words used by the Legislature are given their common and ordinary meaning.")

(1992)). This Court also noted that the "particularized injury" requirement generally means that a plaintiff "must have suffered an injury distinct from that of the public generally." 471 Mich at 615. Because Plaintiffs in this matter have not suffered an invasion of a legally protected interest, they do not satisfy the judicial test for standing, regardless of whether or not they have properly complied with MCL 129.61. Indeed, just weeks ago, in *Daimler Chrysler v Cuno*, ___ U.S. ____ (2006), the United States Supreme Court held that, "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers", slip op at 10, because, *inter alia*, their alleged injury is not "concrete and particularized", nor is the injury "actual" or "imminent", which case casts further doubt on Plaintiffs' standing if it were not for MCL 129.61. AAPS would be happy to brief or address this issue in more detail should the Court so desire.

Again, the portion of MCL 129.61 at issue states, "[b]efore such suit [for an accounting and/or the recovery of funds misappropriated or unlawfully expended] is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto." The language is clear and must therefore be enforced as written, which is precisely what the Circuit Court and the Court of Appeals did.

A. Plaintiffs' Letters Do Not Constitute A "Demand."

The Court of Appeals properly looked to the dictionary definition of "demand"[3], which is defined as "to ask for with proper authority; claim as a right". (*Rohde*, 265 Mich at 710, citing *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002); *Random House Webster's College Dictionary* (1997). Black's Law Dictionary (8th ed) defines demand as "to claim as one's due, to require and seek relief" and "the assertion of a legal or procedural right". And another dictionary defines "demand" as "to ask or call for with authority, claim as due or just; to call for urgently, peremptorily or insistently." *Webster's Ninth New Collegiate Dictionary* (1990). Plaintiffs' letters clearly do not claim anything "as a right", or as "due", nor do they assert any legal rights. Rather, they merely ask that an investigation be undertaken and the use of the funds halted – "at your earliest convenience." The use of the term "investigation" in and of itself implies that something may *or may not be* illegal, and the request that this be done at "your earliest convenience" implies there is no urgency to the request. As for the timing of the letters, as set forth above, "demand" implies urgency or insistence, not something that can wait almost three years to be brought to a court's attention. Under the plain language of MCL

[3] When a term is not defined in the statute, the court will look to its ordinary dictionary meaning for guidance. *See, e.g., Corley v Detroit Bd of Ed,* 470 Mich 274, 279; 681 NW2d 342 (2004); *Title Office, Inc v Van Buren Co Treas,* 469 Mich 516, 522; 676 NW2d 207 (2004).

129.61, Plaintiffs have not made a "demand" and therefore do not have standing to sue under MCL 129.61.

B. Plaintiffs Did Not Make A Demand On The Officer Whose Duty It Would Be To Bring Suit.

The Court of Appeals also correctly found that the letters did not fulfill the requirement that demand "shall be made on the public officer, board or commission whose duty it may be to maintain such suit." It is clear from the wording of the statute that the object of the demand requirement is to give the appropriate persons notice and the first opportunity to bring suit. If and only if a letter, demanding that legal action be taken (not, as here, merely requesting an investigation and the halt of funding), has been sent to the person or entity whose duty it would be to bring such suit, and the recipient fails to bring suit, can the sender take matters into his or her own hands and file a lawsuit under MCL 129.61.

But Plaintiffs' letters contain no reference whatsoever to MCL 129.61. Accordingly, they do not put the recipients on notice that legal action is forthcoming (which it was not, unless "forthcoming" is defined to include suits filed years later). Nor do the letters demand that legal action be brought -- the very basis of the requirement. And they do not request either an accounting or the recovery of the funds spent on domestic parties benefits, the two remedies permitted by MCL 129.61. Finally, as the Court of Appeals noted, no letter was sent to the AAPS Treasurer, the "public officer...whose duty it may be to maintain such suit," and in that regard as well, the statutory requirements were not fulfilled. To the extent Plaintiffs argue that the letters were sent to the School Board, and that fulfills the requirement, they were sent to the Board as it was composed in late 2000 and early 2001, not as it was composed at the time suit was brought. Under the plain language of the statute, Plaintiffs did not make a demand on the proper entity, and therefore, they lack standing under MCL 129.61.

C. The Court of Appeals' Interpretation Is Consistent With The Law At The Time The Statute Was Enacted.

The legislature is presumed to be aware of the law in effect at the time a statute is enacted. *See, e.g., Pittsfield Charter Twp v Washtenaw Co,* 468 Mich 702, 713; 664 NW2d 193 (2003); *Nation v WDE Electric Co,* 454 Mich 489, 494; 563 NW2d 233 (1997). As a result, when the legislature enacts a statute, there is a presumption that it used a phrase "with knowledge of its existing meaning and with intent that the phrase maintain its existing meaning." *Fletcher v Fletcher,* 447 Mich 871, 878; 526 NW2d 889 (1994). Thus, one can look to the law regarding pre-suit demand requirements in place prior to 1929 when MCL 129.61 was enacted for guidance, if necessary.

Hickey v Bd of Supervisors of Oakland Co, 62 Mich 94, 100; 28 NW 771 (1886), involved a claim for mandamus, which claim then required (and still does require) that a demand be made before suit can be brought.[4] The Court found that the plaintiff did not fulfill the demand requirement, stating:

> A party cannot, by filing a claim with the county clerk, who is the clerk of the board, and then giving no more attention, obtain a mandamus to compel the board to investigate, without first making some request of the board to act, and offering to produce proof of the correctness of his claim.

In so ruling, this Court emphasized that the purpose of a pre-suit demand requirement is to give the body at issue the first opportunity to act. Plaintiffs' letters did not request that the AAPS Treasurer (or anyone related to the AAPS, for that matter) bring an action. Rather, as in *Hickey*, the letters merely made a claim (*i.e.*, that the expenditures were unlawful) and then gave

[4] "The discretionary writ of mandamus will not issue to compel action by public officers without prior demand for such action." *Butler v Bd of Supervisors of Saginaw Co,* 26 Mich 22, 26 (1872).

the issue no more attention. As such, the letters do not fulfill the requirements of a pre-suit demand as it was understood at the time of the legislation.

This Court also stressed, prior to the passage of MCL 129.61, the importance of the proper person(s) getting a pre-suit demand. *Detroit Safe Co v Myer*, 192 Mich 215, 217; 158 NW 860 (1916) involved a claim for replevin, which also had a pre-suit demand requirement.[5] The Court held that the plaintiff, who sought the return of a safe he delivered to defendant, which the defendant had not paid for, did not fulfill the pre-suit demand requirement by twice sending a salesman to the defendant's store where he demanded payment or the return of the safe from the owner's son and threatened to "take action". The Court held that this was not a sufficient pre-suit "demand" because, *inter alia,* there was no evidence that the defendant's son had any control over the safe or that he represented his father. 192 Mich at 218. Thus, at the time MCL 129.91 was enacted, the law stressed the importance of a demand being made to the specific individual who is authorized to take the requested action. However, as discussed above, Plaintiffs did not send any letter to the specifically authorized individual, the AAPS Treasurer. (Why the Plaintiffs sent letters to numerous outside parties, including the State Attorney General, the Governor, a prosecutor, and state educational officials, but not to the actual school district Treasurer, has never been explained.)

D. The Court of Appeals' Interpretation Is Consistent With The Purpose Of Demand Requirements

Because the statutory language is clear, it must be enforced as written and this Court need not resort to legislative history to determine the legislative intent. But even if the Court were to want to look to such history, it would find no guidance, as the legislative history of MCL

[5] "The general rule is well settled in this State that where one comes into lawful possession of personal property demand of its surrender is a prerequisite to an action in replevin". *Myers v Sawvel,* 219 Mich 252, 256; 189 NW 88 (1922).

129.61 contains no discussion whatsoever of the demand requirement. Nor has any court in this state, save the Court of Appeals in the instant case, addressed the issue. However, to the extent this Court finds it relevant, one other state Supreme Court has set forth what it believes is the policy behind a pre-filing demand requirement for taxpayer lawsuits. In *Chicago ex rel Konstantelos v Duncan Traffic Equip Co,* 447 NE2d 789 (Ill, 1983), the Illinois Supreme Court read a demand requirement into the Illinois taxpayer lawsuit statute, which did not expressly contain same[6], stating:

> If the demand requirement did not exist for statutory taxpayer suits, overofficious citizens could frustrate the orderly administration of governmental responsibilities, and such citizens would be encouraged to substitute their discretion for that of those to whom the law has confided that discretion.

447 NE2d at 793. Obviously, the doctrine of separation of powers requires that a court tread carefully when asked to review funding decisions made by an elected body. A demand requirement simply allows the legislative body to review the matter and decide on its own whether to take legal action before a taxpayer can take the next step and go to court. A pre-suit demand requirement not only allows this initial review by the entity at issue, it also discourages litigation or, in some cases, likely makes litigation unnecessary. The demand is also akin to the pre-suit demand that must be made before a derivative suit can be brought, and which serves a similar policy. "The original purpose of the [derivative suit] demand requirement is clear: to

[6] That statute, Ill Rev Stat, 24/1-5-1 (1979), stated:

> A suit may be brought by any taxpayer, in the name and for the benefit of the municipality, against any person to recover any money or property belonging to the municipality, or for any money which may have been paid, expended, or released without authority of law. But such a taxpayer shall file a bond for all costs, and shall be liable for all costs in case the municipality is defeated in the suit, and judgment shall be rendered accordingly.

prevent courts from interfering with the internal affairs of private corporations until all intracorporate remedies have been exhausted . . . .The demand requirement should be rigorously enforced." *In re Consumers Power Co Derivative Lit,* 111 FRD 419, 424 (ED Mich, 1986), citing Note, *The Demand and Standing Requirements in Shareholder Derivative Actions*, 44 U Chi L Rev 168 (1976).

In order for the demand requirement of MCL 129.61 to have any real meaning, the Court of Appeals' decision must be affirmed. "Demand" should not be given the flimsy definition Plaintiffs ask for from this court such that any request, idea, or differing opinion expressed by constituents to members of a legislative body constitutes a "demand" sufficient to allow recourse to the judiciary to review the decisions of that democratically elected group at any time in the future. A letter simply cannot be called a demand under the plain language of the statute when that letter:

- is not sent to the proper person (i.e., the person whose duty it would be to maintain such a suit);
- does not even mention the statute under which it is purportedly sent; does not request that legal action be brought;
- does not request either an accounting or the recovery of the funds expended (the two remedies provided by the statute);
- does not call for action with authority;
- contains no sense of urgency;
- gives no hint of the litigation to follow; and
- which is not acted or followed up on for, literally, years.

RELIEF REQUESTED

Defendants-Appellees request that this Court enter an Order denying Plaintiffs-Appellants' Application for Leave to Appeal, or, if it determines that action is warranted by the Court, it peremptorily affirm the Court of Appeals.

Respectfully submitted,

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